

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 599**

July 2010

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer who serves as bail bondsman for his client in a criminal prosecution add to the court's form of bond a provision in which the client agrees that, if the client fails to appear in court, the attorney is authorized to enter a "no contest" plea that will result in a fine and may result in the issuance of a warrant for the client's arrest?

STATEMENT OF FACTS

A lawyer represents an individual who is being prosecuted for a misdemeanor in municipal court. In addition to representing the client in the criminal prosecution, the lawyer also serves as the client's bail bondsman.

The municipal court promulgates a form for bail bonds used in the court's criminal proceedings. The bond form obligates the client, as principal, and the client's surety (here, the lawyer) to pay a specified amount plus fees and expenses that may be incurred by a peace officer in re-arresting the client if any of the conditions of the bond are violated. The conditions of the bond include the client's promise to appear before the municipal court at a specified date and time.

In addition to the standard language in the municipal court's form of bond, the lawyer has added language providing for the client's agreement that, if the client does not make the required personal appearance before the court, the lawyer or an associate is authorized to plead "no contest" on behalf of the client. The language added by the lawyer includes an acknowledgement by the client that such "no contest" plea for the client will have the effect of a guilty plea and will bind the client to pay a fine and court costs, which if unpaid will result in the issuance of a warrant for the client's arrest.

DISCUSSION

In the scenario described above, the lawyer, in addition to representing the client, is engaging in a business transaction with the client by serving as the client's bail bondsman. Rule 1.08(a) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from entering into a business transaction with a client unless specified conditions are met:

“(a) A lawyer shall not enter into a business transaction with a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.”

In the opinion of the Committee, the transaction violates the requirement of Rule 1.08(a)(1) that the terms of the transaction be “fair and reasonable to the client” The provision added to the bond form is contrary to the interests of the client because the provision subjects the client to the possibility of automatic punishment without regard to whether any punishment is deserved and without regard to whether or not the court would have excused the client’s failure to appear. On the facts presented, the added provision is of no benefit to the client but has been added by the lawyer solely to protect the financial interest of the lawyer. Hence, even if all other requirements of Rule 1.08(a) were met, the proposed arrangement would violate Rule 1.08(a)(1) because the terms of the transaction are not “fair and reasonable” to the client.

The arrangement here considered also creates an impermissible conflict of interest for the lawyer in violation of Rule 1.06. Rule 1.06(b) provides that “a lawyer shall not represent a person if the representation of that person . . . (2) reasonably appears to be or become adversely limited . . . by the lawyer’s or law firm’s own interests.” Rule 1.06(c) generally allows representation to continue with client consent in spite of a conflict of interest within the meaning of Rule 1.06(b) if under Rule 1.06(c)(1) “the lawyer reasonably believes the representation of each client will not be materially affected” However, in the situation here considered, the lawyer could not reasonably believe that the representation of the client would not be materially affected. The language the lawyer has added to the conditions of the bond gives the lawyer a substantial incentive to enter a plea of “no contest” on the client’s behalf, without regard to whether such a plea is truly in the client’s best interest. Rather than zealously representing the client by arguing that the court should excuse the client’s failure to appear and rather than simply standing liable under the terms of the bond, the lawyer’s own interests will be better (or more easily) served if the lawyer simply enters the “no contest” plea. This arrangement thus creates a prohibited direct conflict of interest for the lawyer. The result is a situation described in Comment 4 to Rule 1.06:

“Loyalty to a client is impaired . . . in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer’s own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client.”

Finally, the proposed arrangement is contrary to Rule 1.02(a), which provides that, except in circumstances not here applicable, “a lawyer shall abide by a client’s decisions . . . (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.” The language added by the lawyer in the bond purports to authorize the lawyer to enter a “no contest” plea on the client’s behalf but does not condition the entry of such plea on a further consultation between the lawyer and the client. Thus, if the

lawyer acts on this added language without a contemporaneous decision by the client after consultation, the lawyer will violate the lawyer's duty under Rule 1.02(a)(3) to consult with his client and abide by the client's decision with respect to the entry of a plea.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, it is not permissible for a lawyer who serves as bail bondsman for his client in a criminal prosecution to add to the court's form of bond a provision in which the client agrees that, if the client fails to appear in court, the attorney is authorized to enter a "no contest" plea that will result in a fine and may result in the issuance of a warrant for the client's arrest. Such an arrangement is a prohibited business transaction between lawyer and client that is not on terms fair and reasonable to the client, creates an impermissible conflict of interest for the lawyer, and impermissibly purports to eliminate the lawyer's duty to consult with, and abide by the decision of, the client concerning the entry of a plea.